3741

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
APR 27 1903
JAMES H. McKENNEY,
Clerk.

No. 661.

WHITAKER WRIGHT,
Appellant,

vs.

WILLIAM HENKEL, United States Marshal for the Southern District of New York, ET AL.,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S BRIEF.

SAMUEL UNTERMYER,
LOUIS MARSHALL,
Counsel for Appellant.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1902.

WHITAKER WRIGHT, Appellant, vs. WILLIAM HENKEL, United States Marshal for the Southern District of New York, *et al.* Appellees.	No. 661.

APPELLANT'S BRIEF.

This is an appeal from an order of the United States Circuit Court, Southern District of New York, dismissing writs of *habeas corpus* and *certiorari* issued on the petition of the appellant, and denying his application for release on bail on the ground that there was no power or jurisdiction in the Court to admit him to bail and remanding him to the custody of the United States Marshal for the Southern District of New York (Rec., p. 13).

The petition on which the writs of *habeas corpus* and *certiorari* were issued alleged that the appellant is a citizen of the United States, and was imprisoned and restrained of his liberty in the county jail of the County of New York in the custody of William Henkel, Marshal of the United States for the Southern District of New York, by virtue of a warrant dated

March 16th, 1903, issued by Thomas Alexander, United States Commissioner (Rec., p. 1).

The warrant charged that the appellant

" did heretofore, during the month of October, in the " year 1899, and in the month of December, 1900, in the " City of London, in that part of the United Kingdom " of Great Britain and Ireland called England, and " within the jurisdiction of His said Britannic Majesty, " commit the crime of fraud as the director of a com- " pany—to wit, did heretofore and in the month of " October, in the year 1899, and in the month of De- " cember, 1900, at the City of London aforesaid, then " being a director of a certain body corporate—to wit, " the London and Globe Finance Corporation, Lim- " ited, unlawfully make, circulate and publish certain " reports and statements of accounts of the said cor- " poration which were false; the said Whitaker " Wright then well knowing the said reports and state- " ments to be false, with intent thereby to deceive and " defraud the shareholders or members of the said " corporation " (Rec., p. 3).

This warrant was issued on the complaint, on oath, of Sir Percy Sanderson, His Britannic Majesty's Consul General at the Port of New York, which alleged in the language of the warrant, that the appellant had committed the crime of fraud as a director, and that the appellant was a fugitive from the justice of the Kingdom of Great Britain and Ireland and was then within the territory of the United States, and

" that the crime of which the said Whitaker " Wright has so as aforesaid been guilty is an offense " within the treaty between the United States and " Great Britain " (Rec., p. 4).

The petition further alleges that the complaint states no facts which create jurisdiction for the issuance of the aforesaid warrant and for his detention; that it does not state any facts which show that the appellant has been guilty of any offense within the provisions of any extradition treaty between the United States of America and the United Kingdom of Great Britain and Ireland; that he duly objected to

the continuance of any proceedings under the aforesaid complaint and warrant before the said United States Commissioner, on the ground that the said Commissioner had no authority or jurisdiction to proceed therewith on the grounds aforesaid or under any provision of the Constitution or laws of the United States or any treaty of the United States with any foreign country, and that said objections were overruled by the said Commissioner (Rec., p. 1).

Appellant also further alleged that on the 18th day of March, 1903, he presented to the United States Commissioner an application to be admitted to bail pending the proceedings, and in support of his application filed with the Commissioner the affidavit of his attending physician, which showed that the was then suffering from an acute attack of bronchitis, and that his illness was greatly aggravated by his imprisonment and that it might develop into pneumonia (Rec., pp. 1, 5).

The application of the appellant to be admitted to bail was denied on the ground that no authority existed therefor, in spite of the fact that an application was made by the representative of the demanding government for an adjournment of the proceedings until March 30th, 1903, which was granted, and of the statement made by such representative that further adjournments would in all likelihood be thereafter applied for (Rec., p. 2).

The appellant charges

" that his imprisonment and detention are illegal; " that the warrant is wholly void; that the complaint " charges no jurisdictional facts to warrant his im- " prisonment and detention; that the denial to him of " the right to give bail constitutes a violation of the " Eighth Amendment of the Constitution of the United " States and Section 1015 of the United States Revised " Statutes and of the common law of the United States " of America, and constitutes a deprivation of his lib- " erty without due process of law " (Rec., p. 2).

Commissioner Alexander made a return to the writ of *certiorari* which was issued on this petition, setting

forth the proceedings taken before him as above stated (Rec., pp. 6–11), and the appellee made a similar return (Rec., p. 6).

Both writs were dismissed at a term of the Circuit Court held by Judge LACOMBE, who certified

" that upon the hearing of the cause the construc-
" tion and application of the treaties between the
" United States of America and the United Kingdom
" of Great Britain and Ireland with regard to extradi-
" tion was fairly raised by the petition for writs of
" *habeas corpus* and *certiorari*, and was argued on the
" hearing of the same and was determined by the
" Court, and that upon such hearing the power and
" jurisdiction of the United States Circuit Court under
" said treaties and under the United States Revised
" Statutes and the Constitution of the United States of
" America to admit the petitioner to bail pending an
" examination into his alleged criminality, was fairly
" raised by said petition, and was argued upon the
" hearing and was determined by the Court " (Rec., p. 14).

The demanding government claims that the crime charged against the appellant is extraditable under the provisions of Subdivision 4 of Article I. of the extradition treaty of 1889, which refers to

" fraud by a bailee, banker, agent, factor, trustee or director or member or officer of any country, *made criminal by the laws of both countries.*"

It is claimed that by the act XXIV and XXV Victoria, chapter 96, section 84, the offense charged against the appellant is made criminal. The section reads :

84. Whosever, being a director, manager or public officer of any body corporate or public company shall make, circulate or publish, or concur in making, circulating or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security

for the benefit thereof, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned.

The last antecedent section which refers to any penalty is Section 75, which provides that a person committing the offense

"shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

To bring the case within the language of the treaty, the demanding government also claims that this offense is made criminal by the provisions of subdivision 3 of Section 611 of the Penal Code of New York, which reads as follows:

"SECTION 611. *Misconduct of Officers and Employees of Corporations.* A director, officer, agent or employee of any corporation or joint stock association who * * * (3) knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false * * * is guilty of a misdemeanor."

By Section 15 of the Penal Code, it is provided:

"A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this code or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in the penitentiary or county jail for not more than one year or by a fine of not more than five hundred dollars, or by both."

Assignments of Error.

The appellant has made and filed the following assignments of error (Rec., pp. 17, 18) :

FIRST. In dismissing the writs of *habeas corpus* and *certiorari* and remanding the petitioner.

SECOND. In holding that the petitioner is lawfully held in custody.

THIRD. In holding that the crime charged against the petitioner is one which is extraditable within the provisions of Article 1, subdivision 4, of the extradition treaty of 1889 between the United States of America and the United Kingdom of Great Britain and Ireland.

"FOURTH. In holding that the crime charged against the petitioner is one which is made criminal by the laws of both the United States of America and the United Kingdom of Great Britain and Ireland.

"FIFTH. In holding that the crime charged against the petitioner, to wit, the commission of fraud by a director of a company, is made criminal by the general laws of the United States as distinguished from the local legislation of some of the particular States of the Union.

"SIXTH. In holding that it is sufficient to make fraud by a director extraditable if by the law of the State of New York, where the petitioner was arrested, such act is made criminal, irrespective of the question as to whether or not it is made criminal by the general law of the United States.

"SEVENTH. In holding that by sub-division 3 of Section 611 of the Penal Code of the State of New York there was prescribed a crime which is the equivalent of the crime charged in the complaint and warrant on which the petitioner was arrested to have been committed by him in England.

"EIGHTH. In holding that the crimes described in XXIV. and XXV. Victoria, Chapter 96, Section 84, and in subdivision 3 of Section 611 of the Penal Code of New York, were the equivalent of each other.

"NINTH. In holding that no power or jurisdiction exists to admit your petitioner to bail pending the examination into his alleged criminality.

TENTH. In holding that the United States Circuit Court has no inherent power to admit the petitioner to

bail during the pendency of the extradition proceedings against him.

ELEVENTH. In holding that the provisions of the extradition treaty between the United States of America and the United Kingdom of Great Britain and Ireland, or the acts of Congress regulating such proceedings, contain any prohibition against the admission of the petitioner to bail pending such proceedings.

TWELFTH. In holding that Section 1015 of the United States Revised Statutes does not entitle the petitioner to be admitted to bail pending said extradition proceedings.

The record thus presents two important questions for review:

(1) As to whether or not the complaint and warrant on which the appellant is detained in custody charge an extraditable offence within the meaning of the extradition treaties existing between the United States of America and the United Kingdom of Great Britain and Ireland.

(2) As to whether or not the Court below had the power and jurisdiction to admit the appellant to bail pending the extradition proceedings which had been instituted against him.

The appellee claims and Mr. Justice LACOMBE has decided:

1. That the act is extraditable under the clause of the treaty under consideration requiring that the fraud of a director must be such as is "*made criminal by "the laws of both countries,*" if it is criminal where committed and in the particular State or Territory of this country in which the accused happens to be apprehended, although not criminal under Federal law or by the general body of statute law of the several States, or in any State or Territory other than that in

which he is arrested. The words "made criminal by "THE LAWS of the *country*" are held to mean the law of the place of arrest, though that may be in conflict with the laws throughout the country.

2. That because of the absence of an affirmative provision for bail in the treaty, although there is no prohibition to be found there or elsewhere in our laws, the Court is without power to allow bail pending investigation into the extraditability of the offence, and this notwithstanding the rulings of the English Courts allowing bail in like cases.

The appellant contends:

1. That, under the most liberal construction of the clause in question, the offense must be criminal either *(a)* under the common law, or *(b)* by the Federal statutes, or *(c)* by the preponderance of the statute laws of the States, to such an extent that the act may fairly be said to be made criminal by "the *laws* of "both *countries*."

2. That the law of the State in which the accused happens to be apprehended has no relation to the question.

3. That the mere omission in the treaty of an express provision for bail was in accordance with the customary form, and was in no sense an implied prohibition against the power of the Court to allow bail.

4. That the Circuit Court has the inherent power to allow bail in extradition proceedings, especially under a treaty which the Courts of the demanding government have construed as entitling them to allow bail. Treaties are intended to grant reciprocal rights and impose reciprocal duties.

POINTS.

I.

The crime charged against the appellant is not one which is "made criminal by the laws of both countries," to wit, the United States of America and the United Kingdom of Great Britain and Ireland, and does not, therefore, come within the terms of the extradition treaties between those governments.

"Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender. In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision *(1 Moore on Extradition, 21; United States v. Rauscher, 119 U. S., 407")*.

Chief-Justice FULLER in *Terlinden vs. Ames, 184 U. S., 270, 289 :*

The Extradition Treaties.

The provisions relating to extradition, contained in the treaty of 1842, known as the Webster-Ashburton Treaty, are contained in Article X., which reads as follows :

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice, all persons who, being charged with the crime of murder or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper committed within the jurisdiction of either, shall seek an asylum or shall be found, within the territories

of the other ; Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged, shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed ; And the respective Judges and other Magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such Judges or other Magistrates, respectively, to the end that the evidence of criminality may be heard and considered ; and if, on such hearing, the evidence be deemed sufficient to sustain the charge it shall be the duty of the examining Judge or Magistrate to certify the same to the proper Executive Authority that a warrant may issue for the surrender of such fugitive.—The expense of such apprehension and delivery shall be borne and defrayed by the Party who makes the requisition, and receives the fugitive."

By the supplemental treaty of 1889, negotiated between Great Britain and the United States of America through their representatives, Sir Julian Pauncefote and James G. Blaine, Secretary of State, and proclaimed in March, 1890, additional crimes were added to those provided for in Article X., as follows:

"ARTICLE I.

"The provisions of the said Tenth Article are hereby made applicable to the following additional crimes:

"1. Manslaughter when voluntary.

"2. Counterfeiting or altering money ; uttering or bringing into circulation counterfeit or altered money.

"3. Embezzlement ; larceny ; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, *made criminal by the laws of both countries.*

"5. Perjury, or subornation of perjury.

"6. Rape ; abduction ; child-stealing ; kidnapping.

"7. Burglary ; house-breaking or shop-breaking.

"8. Piracy by the law of nations.

"9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas with intent to do grevious bodily harm.

"10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

"Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Tenth Article, provided such participation be punishable by the laws of both countries."

It is attempted to bring the present case under subdivision four of the supplemental treaty, which specifies:

"Fraud by a * * * director * * * of any company, *made criminal by the laws of both countries.*"

A phrase substantially the same as that just italicized is to be found in subdivision ten of Article I., which reads:

"Crimes and offenses against the *laws of both countries* for the suppression of slavery and slave-trading."

[Congress has passed numerous statutes for the suppression of slave-trading (*U. S. R. S.*, §§ *5375*, *5382*, *5524*, *5525*).]

It is also contained in the last clause of the article with respect to participation in any of the crimes mentioned in the treaty, provided such participation be punishable *by the laws of both countries.*

The language of this treaty cannot be enlarged by interpretation so as to include crimes which do not come within the limitation which the signatories of the treaty have expressly created. As is said by Mr. Justice BROWN in *Tucker vs. Alexandroff*, *183 U. S.*, *436*:

"But whatever view might be taken of the question of delivering over foreign seamen in the absence of a treaty, we are of opinion that the treaty with Russia,

having contained a convention upon this subject, that convention must alone be looked to in determining the rights of the Russian authorities to the reclamation of the relator. Where the signatory powers have themselves fixed the terms upon which deserting seamen shall be surrendered, we have no right to enlarge those powers upon the principles of comity so as to embrace cases not contemplated by the treaty. Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter. As observed by LORD DENHAM in Aspdin vs. Austin, 5 Ad. & Al. N. S., 671, 684, 'where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.' The rule is curtly stated in the familiar legal maxim, *expressio unius est exclusio alterius.*"

Doe vs. Braden, 16 How. (U. S.), 657.

What then is meant by the phrase "made criminal by the laws of both countries?" The only countries or governments referred to in the treaty are the United States of America and the United Kingdom of Great Britain and Ireland.

It could not have been contemplated that any single State or Territory composing the United States of America was referred to as one of the countries which concluded the extradition convention. The subject of extradition is one of international cognizance, beyond the purview of State sovereignty; one over which the States composing the American Union have no more jurisdiction than have Ireland, Scotland or Wales.

Thus in *People ex rel. Barlow vs. Curtis, 50 N. Y., 321,* it was decided that by the Constitution of the United States the whole subject of foreign intercourse was committed to the Federal government, and in all questions relating thereto it alone can speak and act. It has the exclusive power to regulate, provide for and

37419

control the surrender of fugitives from justice from foreign countries. Consequently the provision of the United States Revised Statutes providing for such surrender was held to be unconstitutional. In the course of his opinion Chief Justice CHURCH said:

"The whole subject of foreign intercourse is committed to the federal government. Indeed, this was one of the principal purposes of the Union. As to foreign countries, the states, as such, are unknown. The treaty making power is exclusive in the general government not only, but the states are prohibited from exercising it in express terms. * * * If one state may, all the states may make these arrangements, which arrangements may all differ from each other; and the same states may make different arrangements with each foreign nation. The embarrassment which such an exercise of power by the states would produce to the general government in its foreign policy is obvious."

This decision was cited with approval in the *Rauscher Case, 119 U. S., 414.*

Definitions of the Word "Country."

The word "country" has been defined in the Standard Dictionary as follows:

"1. A land under a particular sovereignty or government, inhabited by a certain people or within certain definite geographical limits.

"2. A particular nation or the institutions peculiar to it; by implication or qualification, the land of one's nativity or allegiance."

Webster's Dictionary defines the word "country" as "The terrtory of an independent nation."

When one speaks colloquially of "this country," the United States is meant.

Daniel Webster in the address delivered at the laying of the corner-stone of the Bunker Hill Monument said:

"In pursuing the great objects which our condition points out to us, let us act under a settled conviction,

and an habitual feeling that *these twenty four States are one country.*"

The word "country" has received judicial interpretation from our courts.

Thus, in *Stairs et al. vs. Peaslee, 18 Howard, 521, 526*, Chief Justice TANEY said:

"As regards the second point certified, the word 'country' in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign State, however widely separated, which are subject to the same supreme executive and legislative control. The question was brought before the treasury department in 1817; and, on the 29th of September in that year, instructions were issued by the department, in a circular addressed to the different collectors, in which the construction above stated is given to the word. The practice of the government has ever since conformed to this construction, and it must be presumed that congress, in its subsequent legislation on the subject, used the word according to its known and established interpretation.

"Apart, however, from this consideration, we regard the construction of the treasury department as the true one. Congress certainly could not have intended to refer to mere localities or geographical divisions, without regard to the state or nation to which they belonged. For, if the word 'country' were used in that sense, the law furnishes no certain and fixed limits to guide the appraisers in determining what are its principal markets; and it would often be difficult to decide whether the market selected by appraisers, to regulate the value, was actually within the limits of the country from which the exportation was made. And, moreover, if the construction contended for by the plaintiff could be maintained, it would soon be found that goods would not generally be exported directly to the United States from the principal market where they were procured, but sent to some other place where they were not in demand, to be shipped to this country and invoiced far below their real value. The case before us shows what may be done to evade the payment of the just amount of duty, and neither the words of any revenue law, nor any policy of the government, would justify a construction alike injurious to the public and to the fair and honest importer.

"It follows, therefore, as the cutch in question was

3742

shipped and invoiced from Halifax, that it was the duty of the appraisers to estimate and appraise it according to its value in the principal markets of the British dominions. What markets within these dominions were the principal ones for an article of this description was a question of fact, not of law, and to be decided by the appraisers, and not by the court. They, it appears, determined that London and Liverpool were the principal markets in Great Britain for the goods in question, and appraised the cutch according to its value in these markets. And as the appraisers are by law the tribunal appointed to determine this question, their decision is conclusive upon the importer as well as the government."

In *United States vs. The Recorder, 1 Blatchf., 27 Fed. Cas., 718, 720,* District Judge BETTS said:

"It seems to be maintained on the part of the United States, that the act should be understood to restrict the importation by British vessels, to articles, the production or manufacture of her European possessions, and to compel the productions and manufactures of her dependencies out of Europe, to be brought here in vessels belonging to the place of production or manufacture. This construction is founded upon the assumed import of the term 'country,' employed in the act, in connection with the supposed policy of the statute to establish a condition of reciprocity in respect to the navigation and trade of the country, where that was not already regulated by the convention of July 3, 1815.

"It may be admitted that the term 'country,' used in the act, in its primary meaning, signifies place, and, in a larger sense, the territory or dominions occupied by a community, or even waste and unpeopled sections or regions of the earth; but its metaphorical meaning is no less definite and well understood, and, in common parlance, in historical and geographical writings, in diplomacy, legislation, treaties, and international codes, not to refer to sacred writ, the word 'country' is employed to denote the population, the nation, the state, the government, having possession and dominion over the country.

* * * * * *

"Vattel says:

"The whole of a country possessed by a nation and subject to its laws, forms its territories, and it is the

common country of all the individuals of the nation (*Id.*, Bk. 1, c. 19, §211).

"It is very apparent upon the provisions of the act of 1817 that congress understood and used the term 'country' in the enlarged sense given by Vattel. Thus 'nation,' in the proviso to section 1, 'foreign prince or state,' in section 3, and 'foreign power,' in section 4, all represent, in their connection, the same idea as 'country,' in the first section. The special designation of 'citizens or subjects' does not mark with more precision that the law had reference to political powers and agencies than does the mere word 'country,'—the thing containing, being, by a familiar form of speech, used for that which it contains; and, besides, persons could, with no propriety of language, be styled 'citizens or subjects of a country,' without understanding 'country' to mean the state or nation and not merely a section or portion of territory belonging to the nation. So, in the preamble to the convention of 1815, 'countries,' 'territories' and 'people' are used by the two governments as having one import, and in the first article 'territories' is employed as the correlative 'inhabitants.' Other instances are frequent in our statutes and treaties and diplomatic correspondence, in which foreign countries and territories are referred to as the people, state or nation, occupying and governing them.

"But, in the present case, it seems to us that the phraseology of the first section of the act indicates more distinctly even than the use of the ordinary word 'country' that the regulation had a view to foreign governments and nations and their vessels, and not to the localities within which the individual owners might reside or where the vessels might be employed. The expression of the law is: 'In such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production or manufacture.'"

The Windsor Case.

The meaning of this phrase, with reference to extradition between this country and Great Britain, is illuminated by the decision of the Court of Queen's Bench in *Re Windsor, 6 Best & Smith, 522–530*, de-

37421

cided in 1865 by a court composed of Lord COCKBURN, Mr. Justice BLACKBURN and Mr. Justice SHEE.

That case arose under the Extradition Treaty of 1842 between Great Britain and the United States, and the Extradition Act, VI. and VII. Victoria, C. 76, passed for the purpose of carrying the treaty into effect. The prisoner was arrested on the charge of forgery, committed while a paying teller of the Mercantile Bank of New York, the crime consisting in making fraudulent entries on the books of the bank. Under the Revised Statutes of New York as then in force such false entry constituted the crime of forgery.

Although the Extradition Treaty merely used the word "forgery," without qualification, it was nevertheless held that this must be understood to mean such acts as amount to forgery according to the law of England *and the general law of the United States and that it did not comprise offenses which are only such by the local legislation of some particular State of the American Union.*

The case was argued by able counsel and the opinions are so much in point that they are quoted in full for two reasons, (1) because the phrase "both countries," which is to be found in the treaty of 1889, is used by the Court, not with reference to any fractional part of the United States or of Great Britain, but with reference to both governments; and (2) because they show that the local law of New York, or of any other State of the United States, is not treated by the Courts of Great Britain as the law of *this* country.

LORD COCKBURN said: "We are here called on to put a construction on a statute relating to the extradition of criminals having committed offenses within the jurisdiction of the United States of America, who are found in this country, and whose surrender is demanded by the American government. Among the offenses to which the statute applies, 'forgery' is specified. In this particular instance it is sought to obtain the discharge of the American citizen now in custody; it appears that he was guilty of making a false entry in a book kept by a money corporation of

New York, in which it was his duty to keep an account of the moneys received by him as officer of the corporation, and how they were disposed of. No doubt this was a false entry, and made for fraudulent purposes. But it is clear, for the reasons given by the members of the Court during the argument, that the offense in question did not amount to 'forgery.' *And, there being nothing to show the contrary, the same must be taken to be the law of the United States, which corresponds in general with that of this country.* What was done in this case would therefore no more be a forgery in America than here; and it is only by an act of the local legislature of New York that it is made one. The question we have to determine is, whether this is enough to bring the case within The Extradition Act, 6 & 7 Vict. c. 76, and call on the government of this country to deliver up this man. I think not. The true construction of the statute is, that its terms, specifying the offenses for which persons may be given up, must be understood to apply to offences which have some common element in the legislation of *both countries.* And where a part only of one of the two nations thinks proper to make certain acts an offense which do not fall within that offense as known to the general law of both, it will not be sufficient to bring a case within the statute.

"We ought to interpret the statute according to the intention of both parties, and it would be going far to assume that before passing it the legislature of this country went into an elaborate inquiry as to what by the law of every state of the American Union amounted to forgery, and made this statute with the intention to include each of them within its operation. I believe that in point of fact that was not done, and we ought not to assume that it was. We must assume that the terms used by the parties speaking the same language and with laws so like, used them in the sense which they bear in our own law and in the law of the United States, *and not in that which they have in any particular state of the Union.* The applicant, therefore, ought not to be surrendered. He is also in custody under civil process, but we have nothing to do with that at present."

Mr. Justice BLACKBURN said:

"I am of the same opinion. We have only power to surrender under statute 6 & 7 Vict. c. 76, which

37422

does not say that all criminals are to be given up, but that for some specified crimes they may. The crimes thus specified are those defined in a treaty previously entered into by the two high contracting parties. The charge against the applicant is, that being a clerk in a bank he did embezzle or steal a large sum of its money —that he made an entry in a book stating on his behalf that a certain quantity of specie was deposited in a vault, that statement being false. But that is not equivalent to forgery. Forgery is the falsely making or altering a document to the prejudice of another, by making it appear as the document of that person. Telling a lie does not become forgery because it is reduced to writing. Here this man has not made any false statement purporting to be on behalf of any other person, but a statement purporting to be what it is. It is true that the statute of New York says that such conduct shall be deemed forgery in the third degree ; and observations have been made to show that the act done here was not within that statute. I am inclined however to think it was ; but then does the New York statute saying this make him guilty of forgery within the meaning of The Extradition Act? Two very high contracting parties make a treaty on which The Extradition Act is founded; but we must construe that treaty according to the words used by them when fairly understood, especially when we find both peoples speaking the same language. Forgery is one of the crimes specified, and that must be understood to mean any crimes recognized throughout the United States and in England as being in the nature of forgery. "Piracy" is another, which means offences committed on the high seas, and is so understood by both. But I do not think, if either country were to say that some crime committed on land should be piracy, this would come within the treaty. The meaning of the New York statute is the party shall be punished as if for forgery. I, therefore, agree with the Lord Chief Justice."

Mr. Justice SHEE concurred in both opinions.

Twenty-four years after this case was decided the treaty of 1889 was negotiated, and it must be assumed that the high contracting parties had before them these opinions rendered in the *Windsor case* in which stress was laid on the fact that, in order to admit of extradition, even where there was no special

qualification in the language of the treaty, it was necessary that the offense should be one made criminal by the general law of the United States and not merely by the law of one or more States of the Union.

In the language of Lord COCKBURN: "Where a part "only of one of the two nations thinks proper to make "certain acts an offence which do not fall within that "offence as known to the general law of both, it will "not be sufficient to bring a case within the statute."

Hence, when in three different instances in Article I the Treaty of 1889, the phrase "made criminal by the laws of both countries," or some equivalent phrase was used with respect to offenses purely statutory, it is clear that it was intended that it should be read in the light of the *Windsor case*, and that it did not suffice to create a case under the treaty to show that the statutes of one or more of the States of the Union recognized such a crime as the fraud of a director. In other words, it was necessary that the legislation of Congress or the general legislation of the States of the Union should create such a crime.

So far as murder, perjury, rape, burglary, piracy, larceny, arson, robbery and a number of other enumerated crimes are concerned, they are all common law offences in the several States, and, independently of statute, are made criminal throughout the United States.

It is well known, however, that in addition to these common law offences, there are numerous statutory offences. It is with respect to them, and particularly with regard to fraud of directors and similar fiduciary officers, that it was expressly stipulated that in order to make the offense extraditable it would have to be made criminal not only by the law of Great Britain, but also by the general law of this country.

It is claimed by the appellee that the decision in *Re Arton (No. 2) L. R. Q. B. D. (1896) 509*, lays down a rule opposed to the decision in the *Windsor case;* but on examination it will be found to sustain that principle.

36423

There, the prisoner was arrested on the charge of having committed in France a crime described as "*faux en ecriture de commerce.*" The treaty was both in English and French. The English version contained a description of an offense which was made criminal by the Larceny Act of 1861. The French text described a crime made criminal by the Penal Code of France, using language which was not a translation of the English text but which nevertheless described an offense practically identical. Hence, it was decided that the case came within the extradition treaty and the English extradition acts.

Lord RUSSELL of Killowen concluded his opinion with the following significant language:

"The English and French texts of the treaty are not translations of one another. They are different versions, but versions which on the whole are in substantial agreement. We are dealing with a crime alleged to have been committed against the law of France; and if we find, as I hold we do, that such a crime *is a crime against the law of both countries*, and is in substance to be found in each version of the treaty, although under different heads, we are bound to give effect to the claim for extradition."

The manifest inference is, that if the crime charged against a prisoner is not a crime against the law of the demanding and of the detaining government, there is no basis for the claim of extradition.

The decision in the *Windsor case* was followed and applied in an elaborate opinion by Mr. Justice CARON *in re John C. Eno, 10 Quebec, L. R., 194.*

Eno was the president of the Second National Bank of New York and was indicted for forgery in having made false entries on the books of the bank. He fled to Canada, and on being arrested applied for a writ of *habeas corpus* and was discharged, solely because the crime which he had committed in New York did not constitute the crime of forgery under the laws of Great Britain which were in force in the province of Quebec.

The Court also relied on the decision in *Re Lami-*

rand, 10 Jur., 290, and in *Re Tully, 20 Fed. Rep., 812.*

In the case last cited, which arose in the Circuit Court for the Southern District of New York, Judge BROWN cited and followed the *Windsor Case* and discharged the prisoner.

Judge LACOMBE ignored these authorities, for he said in his opinion (Rec., p. 11) :

> " When by the law of England and by the law of the state in which the fugitive is found the fraudulent acts which it is charged he has committed are made criminal, he is fairly within the treaty; a statute of a state is, broadly speaking, 'a law of this country' as contradistinguished from a 'law of Great Britain.' "

If there were no general statute on this subject in Great Britian, but only a local law in one of its Colonies, or in the Duchy of Cornwall or Lancaster alone, would extradition be possible for such an offense even though it was made criminal by the laws of this country?

It might with equal force have been said in the Windsor case and in the Eno case, that the forgery statute of New York was a law of the United States of America as contradistinguished from " a law of Great Britain "; and yet the courts which decided those cases were of a different opinion, and concluded that a part could not be equal to the whole, and that one of the States of the Union did not constitute this country.

Inasmuch as extradition treaties are based on considerations of reciprocity there is no reason why our courts should take a different view of the treaty under consideration than was taken by the courts of Great Britain.

Moreover, the language of the treaty is not, " made criminal by *a law* of both countries," but its language is, " made criminal by *the laws* of both countries." Hence, the case is not determined by saying that a statute of a State is, broadly speaking, " a law of this country." It is necessary to ascertain what is *the* law of this country.

37424

The appellee would have the Treaty read:

"Fraud by a director made criminal by the law of "the country where the offense was committed and "by the law of the State, Territory or District where "the offender is apprehended."

According to the contention of Judge LACOMBE, a statute of Oklahoma would be the law of this country for the purposes of extradition.

Appellees' counsel lays stress on the language of the treaty of 1842, which provides that the surrender of one arrested on the requisition of a demanding government shall only proceed "upon such evidence of criminality, as according to the *laws of the place* where the fugitive or person so charged shall be found would justify his apprehension and commitment for trial *if the crime or offense had been there committed.*"

This clause does not assume to define any crime or to specify any ground for extradition, or to enlarge the class of crimes enumerated in the treaty, or to make any declaration as to the substantive law. It merely regulates procedure. It enacts that assuming that the offense charged is extraditable that the fact of the criminality is to be established in accordance with the rules of evidence which would be applicable had the offense charged been in fact committed at the place where the arrest has taken place.

The right to extradite and the rules of evidence to establish the crime are not convertible propositions.

Appellees' counsel has cited *Matter of Farez, 7 Blatchf., 345; In re Wadge, 15 Fed. Rep., 864,* and *In re Charleston, 34 Fed. Rep., 531.* We fail to recognize their applicability.

The first of these cases arose under the Treaty with Switzerland, which did not contain language in anywise resembling that of the Treaty now under discussion. It permitted the extradition of persons charged with crimes specified "when these crimes are subject to infamous punishment." There was no qualification to the effect that the punishment should be made in-

famous "by the laws of both countries." Judge BLATCHFORD accordingly said:

"My interpretation of this provision is that when one of the specified crimes has been committed and the extradition of the person who has committed it is demanded, it is sufficient if such a crime is subject to infamous punishment in the country where it was committed, without its being necessary that it should also be subject to infamous punishment in the country from which the extradition of such person is demanded."

This Treaty also contains a proviso as to proof of criminality similar to that found in the Treaty with Great Britain, except that the word "country" occurs instead of "place." We are, however, unable to find in the opinion the commentary to be found in appellees' brief.

The *Wadge* and *Charleston cases* merely relate to matters of procedure and not to the subject of extraditablility.

U. S. R. S., § 5209.

Although on the argument in the Court below the appellee conceded that there was no federal legislation of a general character making the fraud of a director criminal, which is the equivalent of the English statute under which the appellant is sought to be prosecuted, the appellee now contends that Section 5209 of the United States Revised Statutes is an equivalent provision, and brings the case within the qualifying clause of the treaty.

That section, which is found in Title 62, relating to National Banks, and to no other kind of corporation or association, reads as follows:

"Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit,

draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The crime charged in the complaint and warrant in this case is that of making, circulating and publishing certain reports and statements of accounts of the London and Globe Finance Corporation, Limited, which were false (Rec., p. 3).

Section 5209 of the Revised Statutes describes an entirely different offense from that defined by Section 84 of the English Larceny Act, the language of which is used *verbatim* in the complaint and warrant.

The clause of Section 5209 on which the appellee relies is that which relates to the making of a false entry in any book, report or statement of the association. No such crime is charged against the appellant.

Furthermore, it is not pretended that the London and Globe Finance Corporation is a National Bank, or a bank of any description. Section 5209 can have no application to a corporation of any class other than that to which it expressly relates—namely, a National Bank.

The laws regulating national banks and the acts of their directors that are made offenses have no counterpart in any other branch of our law. There are special reasons why the reports of such institutions should be safeguarded that do not apply to other corporations. In all the states a distinct body of offenses is created with respect to directors of banks that are not found in the laws pertaining to other corporations.

There are many other classes of corporations with

respect to which Congress has the power to legislate or has undertaken to legislate even to the extent of creating certain offenses of directors arising out of their acts or omissions.

Illustrations of such legislation are the Sherman Anti-Trust Law, Interstate Commerce Act, and the new Department of Commerce and Rebate laws. They apply to and regulate the duties and internal affairs of every corporation engaged in interstate commerce without reference to the fact of whether or not the particular regulation refers to or in any way affects their interstate business.

The insertion in the bill establishing the Department of Corporations of a provision making criminal a false report by a director of a corporation engaged in interstate commerce would have been quite as much within the power of Congress and fully as germane to the subject matter as any of the many other regulations and penal provisions therein contained affecting the duties and liabilities of directors if it had been the policy of Congress to create such offenses. The act complained of here might have been "made criminal by the laws of this country" within the literal meaning of the phrase so far as concerned corporations engaged in interstate commerce if Congress had so chosen.

Its legislation with respect to directors of national banks and its failure to enact like legislation affecting directors of other corporations over which it had like control whilst creating other penal offenses connected with their offices, is another evidence that the national policy in dealing with directors is in harmony with the laws of the majority of the states on the subject.

Section 84 of the Larceny Act has reference to "any body corporate or public company." The Act of Congress does not apply to "any" corporation, but to a single class and no more; and that class does not include a corporation of the character of the London and Globe Finance Corporation.

A treaty must of necessity refer to general and not

to special legislation. The fraud of a director which is intended to be reached is not that of a director of a corporation belonging to a particular class, as, for example, an irrigation company, or a social club.

N. Y. Penal Code, Section 611.

The appellee principally relies upon the fact that the appellant was arrested within the boundaries of the State of New York, and that the Penal Code of that State provides that

"a director of any corporation who knowingly concurs "in making or publishing any written report, exhibit "or statement of its affairs or pecuniary condition, "containing any material statement wich is false, is "guilty of a misdemeanor."

A comparison between this language and that of Section 84 of the English Larceny Act, discloses that the New York act, in its caption, refers merely to the misconduct of a director, and in its substantive provision makes no reference to the "fraud" of a director. "Fraud" is not an essential element of the offence which it defines. There is no allusion to "fraud." The intent to deceive or defraud is not an element of the offence created.

While the English statute makes the "fraud" of a director of a company criminal, the New York statute does not refer to the fraud of a director, and, therefore, has no provision which is the equivalent of the English statute.

If a resident of New York had violated subdivision 3 of Section 611 of the New York Penal Code, and had fled to England, his act would not be the fraud of a director within the language of the treaty, under the principle laid down in the Windsor case, and he would not be extraditable to this country. His offence, though made criminal by the laws of New York, is not made criminal by the general law of the United States or by the English law, and is not the criminal act, described as "*fraud* by a director."

The Legislation of the States and Territories with Regard to Crimes of Corporate Directors.

We have made a thorough examination of the statutes of the various States and Territories of the Union with a view of ascertaining what legislation there is which bears any relation to the acts of a director in their criminal aspects. The result of such investigation is to be found in the Appendix, which contains every statute that we have been able to find which deals with the subject, whether it be the equivalent of the English statute or not. It will be found from the following summary of these statutes *that in the majority of the States and Territories there is no provision whatever*, and that in most of the instances where crimes committed by directors of corporations are defined the offense is materially different from that described in Section 84 of the English Larceny Act.

Summary of Laws.

1. In twenty-four States and Territories of the Union (21 States and 3 Territories) there *is no statute whatever* corresponding either with the English Act or with Section 611 of the New York Penal Code. These States and Territories, in which there is no law making the act here charged criminal and in which it is *not* criminal, are as follows:

Colorado,
Connecticut,
Delaware,
Georgia,
Illinois,
Indiana,
Maine,
Missouri,
Mississippi,
Michigan,
Nevada,
North Carolina,
Ohio,
Rhode Island,
Texas,
Vermont,
Virginia,
Washington,
West Virginia,
Wyoming,
Oklahoma,
New Mexico,
Indian Territory,
Hawaii.

2. In the remaining twenty-seven States and Territories the condition of the law is as follows:

(a) In seven of those States and Territories, including New York, there are statutes substantially similar to Section 611 of the Penal Code, to the effect that a director, officer or agent of a corporation who knowingly concurs in making or publishing a written report or statement of its affairs or pecuniary condition containing any material statement which is false, is guilty of a misdemeanor. The element of fraud does not enter into the offense.

These States and Territories are:

NEW YORK, OREGON,
IDAHO, SOUTH DAKOTA,
MINNESOTA, UTAH.
NORTH DAKOTA,

(b) In two States and one Territory the offense which is in terms the same as that defined by the New York Penal Code is made a *felony*. They are:

CALIFORNIA, MONTANA,
ARIZONA.

(c) In one State the offense is like that of New York, but is punishable by fine only. That State is:

KENTUCKY.

(d) In five States and Territories, the false statement must have been made with intent to deceive. These are the only States in which the law is similar to the English law.

They are:

NEW JERSEY, MARYLAND,
PENNSYLVANIA, ALASKA,
WISCONSIN.

(e) In one State the making of false statements by officers or directors for the purpose of depreciating the market value of its stock or bonds, and with the further intent to enable the officer or director to buy them in at less than real value, is made penal.

This has clearly no relation to the offence here charged.

ALABAMA.

(f) In one State intentional fraud in deceiving the public or individuals in relation to the means or liabilities of corporations is made penal.

This also wholly foreign to the offence charged.

IOWA.

(g) In one State the making and publishing of false reports of liabilities is made a misdemeanor.

TENNESSEE.

(h) In one State the offense is limited to officers and directors of manufacturing companies :

SOUTH CAROLINA.

(i) In two States the criminal offense relates only to the making of false entries in the books of a corporation with fraudulent intent :

FLORIDA. MASSACHUSETTS.

(j) In four States it relates only to the making of fraudulent statement by directors of banking corporations and of no other corporations :

ARKANSAS. NEBRASKA.
LOUISIANA. NEW HAMPSHIRE.

(k) In one State it is confined to the fraudulent disposition of property and cancelling bonds :

KANSAS.

364

It thus appears that the only states and territories which make criminal the *fraud* of a director in making a false statement or report *with intent to deceive*, a crime equivalent to that defined by Section 84 of the English Larceny Act, are:

NEW JERSEY, PENNSYLVANIA,
MISSOURI, MARYLAND,
ALASKA.

The contention of the British Government resolves itself into this: That if, instead of landing in New York, the petitioner had landed at Newport, Boston, Portland, New Haven, Detroit, New Orleans, Richmond, Seattle, or in any of the other states in which the act with which the appellant stands charged is not made criminal, he could not be extradited.

It is a *reductio ad absurdum* to say that the right of extradition depends upon the question as to whether a person charged with crime and proceeded against is arrested in one state rather than in another.

The test laid down in the Windsor Case is the correct one: Is the act made criminal by the statutes prevailing throughout the United States, by the general law of this country?

Here, in most of the states and territories no such crime as that charged against the appellant is known; and in those states in which there is some statutory regulation on the subject, the crime created differs in essential particulars from that which is the subject of the English legislation.

II.

The Court below in the exercise of its inherent power, had the power and jurisdiction to admit the appellant to bail.

The Commissioner denied the application for bail on the sole ground, as shown in his return, that there was

no power to admit one arrested under the Extradition Law to bail.

Judge LACOMBE denied the right to give bail solely on the ground that the Court had no power or jurisdiction to grant the appellant's prayer in that regard.

This conclusion is based on the theory that because the Extradition Treaty with Great Britain, and Sections 5270–5280 of the United States Revised Statutes with relation to extradition, contain no specific provision on the subject, the power does not exist.

It is to be noted that neither the treaty nor the Revised Statutes contain any prohibition against admitting a prisoner to bail. In the absence of such a prohibition it is insisted that the United States Circuit Court, in the exercise of its inherent and incidental powers, may take bail, and that the Commissioner had the like power.

The position of the appellee is in substance this:

If the appellant had been charged with the commission of any crime, not capital, however heinous in character, against the United States of America, he would have had the right to be admitted to bail.

If he had been arrested in England on the charge now made against him, the right to give bail would have existed.

If he had been a fugitive from the United States, and had been arrested in British territory for an extraditable offense, he could have been admitted to bail.

If he had fled to New York from another State, he might, pending interstate extradition proceedings, have been discharged on bail.

But, although he is a citizen of the United States, although he has not been indicted in England for any offense, although he remained there more than two years after the time when he is alleged to have committed the crime for which he is sought to be extradited, and the public authorities declined to prosecute him, he is denied the right to give bail in these proceedings, because he is charged with having committed

31423

a crime against a foreign government, and there is no express provision in the treaty or statutes providing for bail.

A brief examination of the authorities will, we think, demonstrate that it is the policy of our Government to admit to bail any person arrested in any kind of proceeding, except for contempt and prosecutions for capital offences.

1. THE LAW AND DECISIONS OF THE UNITED STATES.

The Eighth Amendment of the Federal Constitution provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

Article I., Section 5, of the Constitution of the State of New York, provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted, nor shall witnesses be unreasonably detained."

Similar provisions are found in the Constitutions of most of the States.

Section 1015 of the United States Revised Statutes provides:

"Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders."

The power of a United States Commissioner to admit a prisoner to bail, is fully discussed by Judge COXE in a note prepared by him, to the case of *United States vs. Hom Hing, 48 Fed. Rep., 638-640.*

There is nothing in the Statutes of the United States which to the slightest degree deprives the Circuit Court of the United States of the power to admit a prisoner to bail in a case like the present.

It is the policy of the United States to admit to bail any prisoner arrested, except in cases punishable by death, as a matter of right, and this is indicated by the practise in cases of removal of prisoners from one district of the United States to another, in cases of deportation, in cases of interstate extradition, and in criminal cases generally.

In *United States vs. Hamilton, 3 Dallas, 17*, decided in 1795, this Court on an application for a writ of *habeas corpus* issued at the instance of a prisoner who had been committed upon the warrant of the District Judge of Pennsylvania, admitted him to bail.

That decision was cited with approval in *Ex parte Virginia, 100 U. S., 343.*

In *Hudson vs. Parker, 156 U. S., 277* (decided in 1894), it was held that on a writ of error in the case of a conviction of an infamous but not capital crime the prisoner is entitled to be admitted to bail, and that where the Judge before whom the conviction occurred declines to so admit to bail he may be compelled to do so by writ of mandamus.

Mr. Justice GRAY said:

"The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in a court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error. The statute as to bail upon arrest and before trial provide that bail may be admitted upon all arrests in capital cases, and 'shall be admitted' upon all arrests in other criminal cases; and may be taken in capital cases by this Court, or by a Justice thereof, or by a Circuit Court, a Circuit Judge or a district Judge, and in other criminal cases by any Justice or Judge of the United States, or other magistrate named (Rev. Stat., §§ 1014-1016)."

In *Benson vs. McMahon, 127 U. S., 457, 462*, Mr. Justice MILLER while considering the general nature of

37430

extradition proceedings seemed to intimate by his analogy that bail might be taken in those proceedings.

"Taking the provision of the treaty, and that of the Revised Statutes above recited, we are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment *or under bail*, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him."

In *U. S. Volz (14 Blatchf., 15; 28 Fed. Cas., 384)*, Judge BENEDICT, considering a case involving the removal of a prisoner from one district to another, said:

"It has been contended in behalf of the defendant, that at the time this oath was administered, the commissioner had no power to release Somerville on bail, and, consequently, no power to take the justification of a surety, because the offense appeared to have been committed in another district, and Somerville stood committed to await the action of the district judge in regard to his removal to such district for trial. It is claimed that the power of the commissioner terminated with the issuing of the commitment. I do not so understand the law. The power to take bail exists in every case where a party has been arrested for any crime or offense against the United States, and it is in all cases to be taken for trial before such court of the United States as by law has cognizance of the offense. This power never ceases with the issuing of a commitment. The requirement of the statute (section 1015) is, that 'bail shall be admitted upon all arrests in criminal cases, where the offense is not punishable by death'; and, in such cases, it may be taken by any of the persons authorized by section 1014 to arrest and imprison offenders. There is no provision that the right to give bail is to cease with the issuing of a removal warrant, and certainly the right must exist so long as no such warrant is issued. Until the removal warrant is issued, the prisoner is held in arrest under

the commitment of the commissioner, and to that officer application may be made to be released from arrest, on giving bail for trial before such court of the United States as the commissioner shall determine to have cognizance of the offense as proved before him. What power the commissioner may have after the district judge shall have issued his warrant, directing the prisoner to be removed to another district for trial, it is unnecessary now to consider. But it seems plain that, up to the time of the issuing of a removal warrant, the commissioner under whose commitment the prisoner is held has jurisdiction to entertain an application for his release on bail, and, by necessary consequence jurisdiction to administer an oath to one tendering himself for justification as good bail for such prisoner. I am, therefore, of the opinion that the offense of perjury, as defined by the statute, was committed by the accused, when, in a proceeding taken before Commissioner Osborn, to justify himself against the exceptions of the district attorney to his sufficiency as bail for Somerville, a prisoner at that time in custody under the commitment of Commissioner Osborn, and entitled to be released by such commissioner upon giving good bail, he made a deposition containing material statements touching his property, which he did not believe to be true."

In *U. S. vs. Rundlett (2 Curt., 41; 27 Fed. Cas., 915)* it was held that a Commissioner, appointed to take affidavits, &c., under the acts of Congress, has power to let to bail, one brought before him on a criminal complaint, pending the proceedings, in those States where Justices of the Peace have a similar power, and a recognizance to appear before him to have the proceedings completed is valid.

In *U. S. vs. Dana (68 Fed. Rep., 886, 892, 893)*, Judge BROWN said :

" The proceedings for commitment and removal are founded solely on section 1014 of the revised statutes. Plainly, therefore, they must conform to the conditions enjoined by that section. Cases like U. S. vs. Berry, 4 Fed., 779, and U. S. vs. White, 2 Wash. C. C., 29, Fed. Cas. No. 16,685, which did not arise under section 1014, nor involve its application, have little bearing on the question. The proceedings must also con-

37431

form to the fourth amendment of the constitution, which provides that 'no warrant shall issue but upon probable cause, supported by oath or affirmation.' Section 1014 is as follows :

"'For any crime or offence against the United States the offender may * * * by any justice or judge of the United States, or by any commissioner, &c., or by any judge of the Supreme Court, etc., * * * justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, be arrested and imprisoned or bailed for trial before such court of the United States as by law ("as by this act," says section 33 of the Judiciary act) has cognizance of the offence. Copies of the process shall be returned as speedily as may be unto the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case ; and where any offender or witness is committed in any district other than that where the offence is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and the marshal to execute, a warrant of removal to the district where the trial is to be had.

"The whole structure of this section, its provisions in regard to bail, recognizances, witnesses and commitment, and the express provision that the proceeding shall be 'agreeably to the usual mode of process against offenders in such state,' show that the familiar common law proceeding upon complainant for the arrest and commitment of offenders by committing magistrates was intended to be adopted and followed subject to the provision adopting the procedure of the several states. Even the magistrates named are almost identical with those named in the state statutes.

"The proceeding contemplated by section 1014 is, moreover, an original and independent proceeding. It makes no reference to any indictment found elsewhere, nor is there any different provision for such cases. In those cases, by the common law practice, and by the state practice, the defendant, if within the state or kingdom, was arrested upon a bench warrant, or a warrant signed by a justice of the peace, issued directly upon the finding of the grand jury. The bench warrant ran throughout the state, or kingdom ; a justice's warrant had to be 'backed,' or endorsed, by a justice in the county where the defendant was found. 1 Chit. Cr. Law, 342 ; Code

Cr. Proc. N. Y., § 304. As congress has not authorized that mode of proceding upon federal indictments, if the defendant is not within the district where the indictment is found, resort must be had, as it is now considered, to an original proceeding by complaint under section 1014; and whenever that section is appealed to, the procedure required by it must be observed, whether there has been a previous indictment found elsewhere or not. The requirement that the proceeding shall be 'agreeably to the usual mode of process against offenders in such state,' 'was designed,' says Mr. Justice CURTIS, in U. S. v. Rundlett, 2 Curt., 41; Fed. Cas., No. 16208, 'to assimilate all the proceedings for holding accused persons * * * to the proceedings had for similar purposes by the laws of the state where the proceedings should take place.' The words 'mode of process,' he says, are synonymous with 'mode of proceding.'

"This must embrace the preliminary examination usual in the state, including the taking of evidence, depositions, and the examination of witnesses, and the duty of the magistrate in finding probable cause; because, aside from this clause, there is no rule on those subjects; and it cannot have been intended that the proceedings should be conducted arbitrarily, and without any rule at all. The provision also for the commitment of witnesses, contemplates their presence and examination. In making this provision for an observance of the practice in use in the state where the arrest is made, it may be reasonably presumed that the intention of the Judiciary Act was to prevent the hateful appearance of employing summary and arbitrary methods of removal, and to avoid creating prejudice against the new government which would be likely to be engendered through courses of procedure to which the people of the several states were not accustomed, and against which they had just successfully fought. The construction of treaty stipulations is analogous. *In re* Farez, 7 Blatchf., 345, 357; Fed. Cas., No. 4,645."

In cases which have arisen under the Chinese Exclusion Act, the proceedings under which are analogous to those in extradition, the right to give bail has been recognized.

In *Re Ah Kee, 21 Fed. Rep., 701,* proceedings by *habeas corpus* were instituted to test the right of a Chinese laborer to re-enter the United States. It was

37432

held that, pending the proceedings, the Court might order that he continue in the custody of the party detaining him, or commit him to the custody of the marshal, *or release him on bail* to await a decision of the question of his deportation, and that when he has been released on bail he is still deemed in the custody of the law and as never having been landed.

In *Re Chow Goo Pooi, 25 Fed. Rep., 77*, in a similar proceeding, the Court, composed of Judges SAWYER, HOFFMAN and SABIN, said :

"We are unanimously of opinion that when a Chinese person is detained on board of a ship and refused the right to land, whether by the authority of the master in pursuance of the provisions of the Chinese restriction act, or by the refusal of the collector to grant him permission to land, he is restrained of his liberty under or by color of the authority of the United States, and that he is entitled as of common right to sue out a writ of *habeas corpus*, that the legality of his detention and restraint may be passed upon by the court. When his body, in obedience to the writ, is produced in court, we are also of opinion that the control of his person remains with the court and that he may be committed to the custody of the marshal or be held in bail to await the decision of the court. If, on the investigation, the court should be of opinion that he had no right to land, it is its duty to remand him to the custody from which he was taken, if the ship be in port and about to return to the country from whence he came."

In the course of the opinion the Court likened the proceedings for deportation to those in extradition (p. 81).

2. THE LAW OF NEW YORK.

The Code of Criminal Procedure, in Sections 550–592, makes the amplest provisions on the subject of bail. By Section 553 it is declared that in cases of misdemeanor a defendant may before conviction be admitted to bail as a matter of right.

Section 831 of the Code of Criminal Procedure,

which relates to fugitives from another State or territory into New York State for whose delivery a requisition has been made by another State, provides:

"Any Judge of any court named in Section eight hundred and twenty-seven may in his discretion, admit the person arrested to bail, by an undertaking with sufficient sureties and in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, which must not be later than the expiration of thirty days from the date of arrest, exclusive of such date, and for his surrender to be asserted upon the warrant of the Governor of this State."

In *State vs. Hufford, 23 Iowa, 579*, it has been held in a similar proceeding that the right to give bail exists.

The adjudications of the New York courts with regard to the inherent power of the courts to admit a defendant to bail are considered under subdivision 4.

3. THE DECISIONS IN ENGLAND AND CANADA ON THE RIGHT TO BAIL IN EXTRADITION CASES.

The precise question here involved was passed upon in *Queen vs. Spillsbury, 2 Q. B. D. (1898), 615*, by Lord RUSSELL, of Killowen, and by Justices WRIGHT and KENNEDY in a case where a prisoner who had been guilty of a riotous assembly and an attack upon the navy of the Sulton of Morocco had, after an examination by the committing magistrate in London, been remanded for surrender. Under the English statute he was to be kept in custody for a period of fifteen days after such remand: and during that period an application was made for a writ of *habeas corpus* to review the adjudication of the committing magistrate, which held the prisoner guilty of an extraditable offense, and his discharge, or, in the alternative, for an order admitting him to bail.

Lord RUSSELL, after considering the testimony, came to the conclusion that a case of criminality had been made out which justified the direction of the committing magistrate that the prisoner should be surren-

37433

dered; but on the question of the right to give bail, even at so late a day in the proceedings as is indicated, it was decided that the power existed.

The opinion then proceeds:

"Now arises a question of some difficulty. Failing the application to set aside the order for the return of the defendant, he asks that he may be admitted to bail until the time when he is to be returned. So far as I know this is the first occasion on which this question has arisen for decision. It is necessary to consider first how the question is to be viewed. Was Mr. Sutton right in saying that the defendant was bound to show that power is given to admit to bail under the Fugitive Offenders Act, 1881, or, in other words, is the onus of showing that the power to admit to bail exists cast on the defendant? I think not. This Court has, independently of statute, by the common law, jurisdiction to admit to bail. Therefore the case ought to be looked at in this way; does the Act of Parliament, either expressly or by necessary implication, deprive the Court of that power? The law relating to this subject is well stated in 1 Chitty's Criminal Law, 2nd Ed., p. 97, as follows: 'The Court of King's Bench, or any Judge thereof in vacation, not being restrained or affected by the statute 3 Edward, 1, c. 15 (1), in the plentitude of that power which they enjoy at common law, may, in their discretion, admit persons to bail in all cases whatsoever, though committed by justices of the peace or others, for crimes in which inferior jurisdictions would not venture to interfere, and the only exception to their discretionary authority is, where the committment is for contempt, or in execution. Thus they may bail for high treason, murder, manslaughter, forgery, rape, horse-stealing, libels and for all felonies and offences whatever.' I now proceed to examine the question whether in the present case the Fugitive Offenders Act, 1881, excludes or circumscribes the power of this Court to admit prisoners to bail. It is not suggested that it does so by express words. The question then arises whether it does so by implication. If it does, a curious result would follow, for it is clear that the magistrate may remand the defendant pending the inquiry, and the inquiry may extend over a long period of time, and it is also clear that the magistrate may admit the defendant to bail as often as he remands him; it is also conceded, that when the defendant is returned to the place

to which his return is demanded, the tribunal having jurisdiction in that place can admit him to bail pending the result of the trial; and, this being so, it would be a strange result if there were no jurisdiction to admit him to bail during the period between the making of the order for his return and his return. Therefore, forming the best judgment I can, I am of the opinion that this Court has the power to admit a defendant to bail in such a case as the present. Mr. Sutton put this point: Supposing a defendant, having committed by the magistrate, is admitted to bail by this Court, how is he to apply for a Habeas Corpus, seeing that he is already at large? I think there is really nothing in the point. He could apply for a habeas corpus before he was released on bail, but the language of s. 5 of the Act is conclusive. That section provides that 'where the magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*, or other like process.' These concluding words show that, if the fugitive is committed to prison he may apply for a writ of *habeas corpus* or other like process, 'on grounds which go to the validity of the order for his return, and he would have the same right to apply if he were released on bail. Another point was taken which raises a little more difficulty. It was suggested that if a man were admitted to bail, and he went away and declined to surrender, there would be no remedy except by entreating the recognizances, which would not have the effect of carrying out the intention of the Act; but in such a case it cannot be denied that the proceedings might be commenced *de novo* and a fresh warrant issued, on which the accused could be arrested; this might, no doubt, cause delay, but the difficulty would not be insuperable. For these reasons, having carefully considered the different sections of the Act, and admitting that some difficulty might possibly arise in working out the procedure, I have come to the conclusion that the provisions of the statute are consistent with the recognition of the power of this Court to admit to bail in such cases as the present. This inherent power to admit to bail is historical, and has long been exercised by the Court, and if the Legislature had meant to curtail or circumscribe this well-known power, their intention would have been carried out by express enactment."

37434

It will be seen that two proposition were clearly decided, (1) that unless the Extradition Act withheld or limited the power of the Court to admit the prisoner to bail, the inherent powers of the Court in that regard were not affected; (2) that it was one of the inherent powers of the Court to admit a prisoner to bail.

In *ex parte Foster*, decided by the Court of Queen's Bench in Canada, in 1872 (reported in Consolidated Digest of Quebec, under title Extradition), it appeared that Foster had been committed for extradition under the treaty between the United States and Great Britain. The next term of Court at which a review of the decision could take place was to be held seven days thereafter. On a writ of *habeas corpus* the prisoner was admitted to bail pending the proceedings.

4. THE INHERENT POWERS OF COURTS WITH REGARD TO BAIL.

It may be stated as a general rule that any court or magistrate that has jurisdiction to try a prisoner in any case has jurisdiction to discharge him, and *a fortiori*, to admit him to bail. The power to bail must be incident to the power to hear and determine. If the Court has power to grant a gratuitous discharge, it must follow that it has power to discharge *sub modo*. If it has power to discharge without bail, *a fortiori*, it may discharge with bail.

An interesting historical discussion on the right to admit a prisoner to bail is contained in the report of the case of *People vs. Goodwin, 1 Wheeler's Criminal Cases, 434*, where the inherent power possessed by courts in that regard was thoroughly considered by Chief Justice SPENCER, and the authorities elaborately reviewed.

In *People vs. McLeod, 1 Hill, 377*, the use of the writ of *habeas corpus* for the purpose of admitting a prisoner to bail was recognized by Mr. Justice COWEN; although in that case, which was one in which the prisoner had been indicted for murder, the offense was

considered not bailable. In a note, on page 393, the case of Aaron Burr is adverted to, and reference is made to the fact that Chief-Justice MARSHALL, who sat as a Commiting Magistrate, admitted Burr to bail on the preliminary examination which was held before him in person *(1 Burr's Trial, by Robertson, 18-20, also 106)*. Subsequently, when Burr was indicted, an application was made to admit the prisoner to bail, and in the course of the discussion the Chief-Justice declared, " that the act of Congress, in express terms, enabled the court to bail a prisoner arrested for treason. That there was no distinction between treason and other criminal cases, as to the power to bail upon arrests; but that an arrest might be after a finding by a grand jury; in which case, the finding of the grand jury would be the evidence on which the court would have to judge, whether the party arrested ought to be bailed. They were to exercise their discretion according to the nature and circumstances of the offense, and of the evidence and usages of law; that the usages of law were to be found in the common law, and the practice of the courts."

In *People vs. Van Horne, 8 Barb., 158*, a prisoner who had been indicted for murder was admitted to bail by the Court of Oyer and Terminer. In the course of his opinion Mr. Justice PAIGE said :

" We entertain no doubts in relation to our power to bail in this case. The power of the Supreme Court, or of a justice thereof, to bail in all cases, whether it be treason, murder, arson or any other offense, is indisputable. The same power is possessed by this court. The power to bail is incident to the power to hear and determine."

At page 167 he says :

" As I have already stated, the object of imprisonment before trial is not the punishment of the delinquent, but merely to secure his appearance in court when his trial is to be had. Chief-Justice SPENCER (People v. Goodwin) says, ' Until his guilt is legally ascertained, there is no ground for punishment, and it would be cruel and unjust to inflict it.' "

In *State Treasurer vs. Rolfe, 15 Vt., 9*, the Court said :

"It is undoubtedly incident to every court having criminal jurisdiction, not only to bring the offender before them, but to take bail for his appearance in such form as shall secure the object intended, to wit, the appearance of the person accused, at all times when required."

See, also, *State vs. Edney, 4 Dev. & B., 378.*

The Court of King's Bench or any Judge thereof had the amplest discretion to admit to bail in all cases whatsoever.

Rex vs. Rudd, Cowp., 331.
Rex vs. Marks, 3 East, 157.
Rex vs. Baltimore, 4 Burrows, 2179.

In 3 Hawk. Pl. Cr., 225, it is said :

"The Court of King's Bench has the power to bail in all cases whatsoever, and the judges will, in general, exercise it in favor of a prisoner in every case not capital, and in capital cases where there is any circumstance to induce the court to suppose he may be innocent, and in every case where the charge is not alleged with sufficient certainty."

See, also,

4 Black. Com., 299.
2 Hale's Pl. Cr., 129.
4 Cokes Inst., 71.

In *Comb's Case, 10 Mod., 334*, it was held that the Court of King's Bench has power to bail for high treason.

The *Habeas Carpus Act (31 Charles II.)* was enacted for the purpose, among others, of making the right to give bail a constitutional privilege.

This right is especially enforced in cases of misdemeanor where it is absolute at any stage of the proceedings before final commitment.

2 Hale's Pl. Cr., 128.
Rex vs. Judd, 2 T. R,, 255.
Linford vs. Fitzroy, 13 Jur., 303.
Ex parte Tayloe, 5 Cow., 39.

In *U. S. vs. Evans, 2 Fed. Rep., 152*, Judge HAMMOND speaks of the inherent power of the Courts to take bail.

The opinion of Lord RUSSELL in *Queen vs. Spilsbury (supra)* recognizes the existence of the inherent power of the Court in this particular, to the fullest extent.

The American text-writers are equally pronounced in their views :

In *Church on Habeas Corpus (2d Edition), Section 390*, the author says :

" The right to bail existed at the ancient common law, and though the prisoner could not demand bail as a matter of right, he might, and still may, except where the matter is otherwise regulated by statute, be admitted to bail for any offense. He could be bailed for treason, murder, manslaughter, forgery, rape, libels —in short, as we have said, for all felonies and misdemeanors whatsoever. This plentitude of power was exercised by the Court of King's Bench or any judge thereof in vacation, but the general rule was, ' *Whosoever is judge of the offense may bail the offender.*' This power rested in the sound legal discretion of the judge awarding the writ of *habeas corpus ;* but in the rules which the court and judges observed, they were guided by a series of decisions ; for the discretion to be exercised by a court of justice is not a wild but a sound discretion, and to be confined within those limits to which an honest man, competent to discharge the duties of his office, ought to confine himself."

At *Section 395* he says :

" In ancient times, the sheriff possessed judicial powers as well as ministerial, and was the principal bailing officer. In many states of the American Union he may take bail ; in others, not. Bishop evolves this rule from the authorities : ' In general, all judges of the superior courts, and especially those who are authorized to issue the writ of *habeas corpus*, whether sitting as a court or in chambers, may grant bail in criminal cases. On narrower ground, the power to hear an accusation carries with it the authority to bail the accused person if bailable ; and there are circumstances and localities in which a judge not having this jurisdiction cannot take bail. A justice of the peace while exercising a jurisdiction over a particular cause,

not finally disposed of, can, as incident thereto, grant bail. And by the statutes in some of the states his authority extends somewhat further. But he has not the full power of the judges of the higher courts."

See, also, *1 Bishop's New Criminal Procedure*, §§ *251*, *1406*, *1407*.

In answer to these authorities Judge LACOMBE suggests (Rec., p. 12) that they are not persuasive because they are based on what Lord RUSSELL has termed the "historical" inherent power of the Court of King's Bench to admit to bail independently of statute, and urges that the Circuit Courts of the United States have no such historical heritage but are the creatures of statute and have only so much of the judicial power of the United States as the acts of Congress have conferred upon them.

While it is true that these Courts are of statutory origin, it does not follow that it is necessary to point to a statute in every instance as authority for the exercise by those Courts of judicial powers. As Courts, they possess those powers which are of necessity incident to all Courts, such powers as are ordinarily denominated inherent.

Among these is the power to punish for contempt, to control their records, to correct mistakes and clerical errors, to make rules, to control calendars, to perform the ordinary functions of a judicial tribunal. It is our contention that among such incidental and inherent powers is the power to admit to bail a prisoner, who is regularly before the Court in a proceeding in the course of which the Court has the right to discharge the accused absolutely. *Omne majus in se continet minus.*

Among other authorities which indicate the possession of such inherent powers, even by Courts of statutory creation, we instance the following:

In *Ex parte Robinson*, *19 Wall.*, *505*, *510*, Mr. Justice FIELD said:

"The power to punish for contempts is inherent in all courts; its existence is essential to the preserva-

tion of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. *The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.*"

To the same effect are:

U. S. vs. Hudson, 7 Cranch, 302.
Anderson vs. Dunn, 6 Wheat., 204, 227.
Ex parte Terry, 128 U. S., 302, 303.
Cartright's Case, 114 Mass., 230, 238.

The opinion of Judge SAWYER *in re Neagle, 39 Fed. Rep., 856, 857,* contains an interesting discussion of the inherent powers of the Courts to protect themselves, and the English origin of such powers.

The exercise of ancillary jurisdiction by the United States Circuit Courts irrespective of diversity of citizenship has been expressly predicated on the ground that "the powers both of courts of equity and courts of law over their own process to prevent abuse, oppression and injustice *are inherent.*"

Freeman vs. Howe, 24 How., 450.
Krippendorf vs. Hyde, 110 U. S., 276.
Grumbel vs. Pitkin, 124 U. S., 131, 143.

Although in *Bath County vs. Amy 13 Wall., 244,* which is relied upon by Judge LACOMBE to support his position, it was held that the United States Circuit Courts have no original jurisdiction in proceedings for mandamus, it was held in *Labette County Commissioners vs. United States, 112 U. S., 217,* that as incidental to jurisdiction previously acquired a mandamus could issue even to strangers, on the principle announced in *Krippendorf vs. Hyde (supra).*

In *Matter of Henderson, 157 N. Y., 423, 426,* Judge O'BRIEN, speaking of the Surrogate's Court, which is a statutory Court, said:

"Limitations upon the power of the court to do justice to suitors, or upon the right of parties to apply to the court for relief whether by suit or otherwise, have their basis wholly in some statute or positive law.

37457

At common law there was no limitation whatever. The party aggrieved could sue or invoke the aid of the court in his behalf at any time. The general powers of the surrogate's court are wholly statutory, but it certainly must possess such incidental powers as are necessary to a proper exercise of those expressly conferred. *All courts, from their very nature and the object of their existence, must possess some inherent power*, and the correction of their own records, when affected by some mistake or clerical error, would seem to be about as mild an exercise of such power as can well be imagined. This power is recognized and perhaps regulated by various statutes, but it does not proceed from or rest upon statutes, since it would exist without them."

Again conceding the statutory origin of the United States Circuit Courts, yet those Courts, in a general way, are, so far as subjects of federal cognizance are concerned, the counterpart of the Court of King's Bench, and proceed according to the practice and traditions of that Court.

Rule 3 of the rules of this Court provides that this Court considers the former practice of the Courts of King's Bench and of Chancery in England as affording outlines for the practice of this Court, and the reports are full of illustrations indicating that the Federal Courts have modeled their procedure and have exercised their powers within the jurisdiction over persons and subject matter conferred by statute, in accordance with the practice prevailing in the Court of King's Bench.

According to the appellee's contention the Federal Courts have no general jurisdiction in law and equity.

5. THE DECISION IN RE CARRIER.

The only authority which has been cited as adverse to appellant's contention, on this branch of the case, is the decision of Judge HALLETT in the United States District Court for Colorado *(in re Carrier, 57 Fed. Rep., 578,* decided in 1893).

An examination of that case, however, will indicate

that the Court proceeded upon the theory (1) that there was no provision in the Act of 1848 admitting a prisoner sought to be extradited to bail ; and (2) that the language of the Act of 1848 indicated that at a certain stage in the proceedings it is the duty of the Judge or Commissioner to issue his warrant for the commitment of the prisoner in charge to the proper jail, there to remain until such surrender shall be made, and that this negatives the right to bail.

The first of these reasons is in direct conflict with the reasoning of Lord RUSSELL in *Queen vs. Spillsbury*, and ignores not only the inherent powers of the Court, but also the public policy of the United States as declared by Mr. Justice GRAY in *Hudson vs. Parker, 156 U. S., 277*, which was decided one year subsequent to the decision in the *Carrier Case*.

In fact, the provision of section 5270 of the United States Revised Statutes (which is a re-enactment of the Extradition Act of 1848 to which reference is made), instead of being an authority for the contention of Judge HALLETT is really an authority for the converse of his proposition. It refers solely to the issuing of a warrant of commitment after there has been a hearing on the question of criminality and the evidence has been deemed sufficient to sustain the charge made by the demanding government. The very fact that the statute only refers to a commitment to the proper jail for the purposes of surrender, after such hearing and adjudication, negatives the idea that until there has been such an adjudication, bail cannot be taken.

Section 5270 reads as follows :

"Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any state, district or territory, with having committed

within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Furthermore, stress is laid on the fact that the Act of 1882 amended the Act of 1848 in respect to the manner of getting testimony and other subjects, but that the subject of bail was not touched upon. This argument, when the entire frame-work of the Extradition Act is considered, is really an authority in favor of our contention.

The Treaty of 1842 requires that the person apprehended shall be brought before a Judge or other magistrate,

"to the end that the evidence of criminality may be
"heard and considered, and if on such hearing the
"evidence be deemed sufficient to sustain the charge,
"it shall be the duty of the examining judge or magis-
"trate to certify the same to the proper executive
"authority that a warrant may issue for the surrender
"of such fugitive."

This language does not indicate a withholding of the right to give bail. It does require evidence of criminality. So did the Extradition Act of 1848.

In the absence of any statute to the contrary this evidence of criminality would necessarily have to be common-law evidence—that is, the oral testimony of witnesses and original documents would have to be

produced. Depositions would be insufficient to comply with the requirement of the treaty and the statute.

When, therefore, the Act of 1882 amended the provisions of the Act of 1848 with regard to the reception of depositions and proof other than common-law proof, Congress recognized the fact that but for such legislation the Courts would have been confined to the reception of common-law evidence. In other words, the inherent powers of the Courts were, in that regard, limited and circumscribed. In all other respects, however, the inherent rights and powers of the Courts were unaffected.

It follows that, in the absence of a provision in the treaty or in the statutes of the United States depriving the Courts of the power to take bail, such power exists.

That such power must exist in the present case is evident from these facts : If the petitioner had been indicted by the Grand Jury of the United States of an offense against the Government of the United States, however heinous it may have been, unless it were a capital one, he would have had the right to be admitted to bail. If he had been indicted for the offense with which he now stands charged in the Courts of England, he would, under the English law, have been entitled to give bail. He has not been indicted, however. He has been arrested on a complaint, based upon a cablegram. The offense with which he stands charged is, in our opinion, non-extraditable. No charge was made against him in England until he was on the high seas, on his way to this country, and he did not leave England until two years after the offenses with which he now stands charged were committed, and after the Attorney-General had declared in Parliament that no criminality attached to any acts done by the petitioner.

The Treaty permits of his detention for two months for the presentation of evidence of criminality. It could not have been contemplated that an American citizen should be deprived of his Constitutional right

37439

to bail during all that time without a hearing, and on a charge which, if committed in his own country, would not have been generally criminal, and which in some of the States where it is made criminal is punishable only by a fine.

He has already suffered six weeks imprisonment, though at all times prepared to furnish bail. What becomes of his Constitutional protection against excessive bail when he can be committed and held without bail?

To imprison the appellant under these circumstances without bail, is contrary to the policy of every civilized country, and it is not unreasonable to say that unless there is an express provision in the statute which deprives the Court of the power to admit the prisoner to bail, that power must be deemed to exist.

Rule 34 of the Supreme Court, which was referred to on the argument in the Court below does not seem to touch this case. That refers merely to the custody of prisoners after a final decision on a writ of *habeas corpus*. Where the writ is denied the custody of the prisoner is not to be disturbed. Where it is granted it is within the power of the Court to require surety from the prisoner for his appearance to answer the judgment of the Appellate Court, except where, for special reasons, sureties shall not be required.

This case is a typical case of an application for a writ of *habeas corpus* for the purpose of admitting the prisoner to bail pending an examination into his criminality. This office was conferred upon the writ of *habeas corpus* by 31 Charles II., and has been applied in many cases, *United States vs. Hamilton*, *Queen vs. Spillsbury*, *People vs. McLeod* and *In Re Carrier*, being illustrations.

It has been suggested that our government is under a moral obligation to surrender the prisoner, and that that obligation may not be met if the prisoner should escape while released on bail.

But the same argument might be used with respect to interstate extradition ; to the removal of a prisoner

arrested in this district to another district of the United States. It was made in the case of Queen vs. Spillsbury. It might be made in any case where a prisoner is admitted to bail.

Yet it is believed to be the uniform experience of the civilized world that when a prisoner is admitted to bail his sureties are interested with the government in providing for his attendance at the time required. This affords sufficient security to the government which admits the prisoner to bail that he will be forthcoming when directed to do so.

Judge LACOMBE intimates that the assumption of a treaty obligation by the United States affords a sufficient reason for not providing for enlargement on bail, lest if the person sought, to be extradited should escape while at large on bail, that obligation could not be performed. Yet the English goverment has not in the past been swayed by such considerations to the extent of surrendering its views on a subject of public policy, for during the administration of President Grant, it declined, for a period, to extradite any fugitives from the justice of the United States, notably the forger Winslow, because Mr. Fish, our Secretary of State, did not accede to the interpretation given to the treaty of 1842 by the English government. The diplomatic correspondence is fully set forth in *2 Wharton's Digest of Internatiinal Law, Article Extradition.*

1. Moore on Extradition, § 152.

It is also asked to whom the recognizance should run. The answer is simple—to the United States of America, of course. The warrant in this case is issued under the authority of the United States in the name of the President. The proceedings are in a tribunal of the United States. If the prisoner should be surrendered it would be by virtue of process issued under the seal of the United States. Hence, the recognizance must run to the government under whose sanction the proceedings are instituted; just as in the case of in-

37440

terstate extradition, the recognizance would run to the People of the State in whose tribunal the extradition proceedings are pending.

III.

Assuming that the power to take bail exists, there is every reason why the Court below should have admitted the appellant to bail.

The reasons considered under the last point do not require reiteration. The fact that the prisoner remained in England more than two years after the failure of the corporation of which he was a member, that he gave his testimony in insolvency proceedings concerning the affairs of the company and concealing nothing when interrogated with regard to its affairs, indicates that he will be forthcoming if it should be ultimately decided that the offence is extraditable and that proof of criminality exists.

It is a subject of public knowledge that the Attorney-General and Solicitor General of England stated on the floor of the House of Commons that after a careful and thorough examination no ground for a criminal charge existed, and that the present proceedings are the result not of a public but a private prosecution, after the Public Prosecutor of England, on application made to him, had refused to prosecute, and had been sustained in his action by the Prime Minister on the floor of the House of Commons. This is another reason why the Court should not hesitate to admit the prisoner to bail.

Furthermore, the proof shows that his health has been affected by his imprisonment and that he was in physical jeopardy by reason thereof, although his

physical condition is better than it was at the time when the affidavit of the physician which forms a part of the record was made.

IV.

It is respectfully submitted that the appellant should be discharged from imprisonment or at all events the Court below should be instructed to admit him to bail, pending the proceedings for his extradition.

Samuel Untermyer,
Louis Marshall,
Appellant's Counsel.

APPENDIX.

Legislation of the Several States and Territories with Regard to the Crimes of Corporate Directors.

ALABAMA.

(CRIMINAL CODE, 1896, VOL. II., SECS. 4737, 3819, 4375 :) KEEPING FALSE BOOKS OF ACCOUNTS BY OFFICERS OR AGENTS OF CORPORATIONS. Any officer, agent or servant of any private or municipal corporation who keeps false books or accounts, or makes false entries therein, with the intent to deceive, injure or defraud such corporation, or the officers or agents thereof, or, if a private corporation, the stockholders therein, must, on conviction, be fined not less than one hundred nor more than one thousand dollars, and may also be sentenced to hard labor for the County for not more than two years, one or both, at the discretion of the jury.

SECTION 4776. Any president, director or managing officer of any corporation, by whatsoever name or title he may be known or called, who shall do or omit to do any act, or who shall make any declaration or statement in writing or otherwise with the intent to depreciate the market value of the stock or bonds of such corporation and with the further intent to enable such president, director or other managing director to buy any such stock or bonds at less than the real value thereof, must on conviction be fined not more than $500 and shall be sentenced to hard labor for the county for not less than six nor more than twelve months.

ALASKA.

Penal Code, § 73 (Carter, 1900).

SECT. 73. *Officer, &c., of Corporations Falsifying Records.* That if any person being or assuming to be an officer, agent or member of any private corporation or company shall with intent to defraud or deceive any one, willfully and knowingly destroy, alter, mutilate or in any manner falsify or concur in the destruction, alteration, mutilation or falsification of any of the

books, papers, writings or securities belonging to or in the possession of such corporation or company, such person upon conviction thereof shall be punished by imprisonment in the county jail not less than three months nor more one year or by fine not less than $50 nor more than $1,000.

SECT. 74. *Officer, etc., of Corporations Publishing False Reports.* That if any person being or assuming to be an officer, agent or member of any private corporation or company shall, with intent to defraud or deceive any one, willfully and knowingly make, circulate or publish, or concur in the making, circulating or publishing, any written or printed statement or account concerning or relating to the liabilities, assets or property of such corporation or company, which statement or account shall be false in any material particular, such person upon conviction thereof shall be punished in the manner provided in Section 73.

ARIZONA.

Revised Statutes, 1901, Penal Code.

§ 507. (Fraudulent book entries or erasures by director, officer or agent of any corporation or joint stock association punishable by 3 to 10 years imprisonment, fine not exceeding $500).

§ 508. Every director, officer or agent of any corporation or joint stock association who knowingly concurs in making, publishing or posting any written report, exhibit or statement of its affairs or pecuniary condition, or book or notice containing any material statement which is false, or refuses to make any book or post any notice required by law other than such as are mentioned in this chapter is guilty of a felony.

ARKANSAS.

SECTION 1788. Any president, secretary, receiver, accounting officer, servant, agent or person who shall knowingly make any false answer to any question or statement required by law touching the business, property, moneys and credits of such person or corporation liable to taxation shall be deemed guilty of perjury.

(This crime classified among Offenses against the Revenue.

ACTS OF ARKANSAS, 1901. ACT VII.

An act to prohibit the making of false statements of banks and the receiving of money and deposits when insolvent, and to prescribe penalties for same.

SECTION 1. Prescribes penalties for employees of banks making false entries on books or statements.

2. Prohibits banks from receiving deposits when insolvent, and prescribes penalty for doing so.

3. Repeals all laws in conflict, and act takes effect from passage.

Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. Every officer, agent or clerk of any bank organized or doing business under the law of the State, who willfully and knowingly subscribes to, or makes any false reports, or any false statements or entries in the books of such bank, or knowingly subscribes or exhibits any false writing or paper, with the intent to deceive any person or persons as to the condition of such bank, shall be punished by fine not exceeding one thousand dollars ($1,000), and imprisoned in the county jail not exceeding one (1) year.

CALIFORNIA.

SECTION 564. Every director, officer or agent of any corporation or joint stock association, who knowingly concurs in making, publishing or posting any written report, exhibit or statement of its affairs or pecuniary condition, or book or notices containing any material statement which is false, or refuses to make any book or post any notices required by law in the manner required by law other than such as are mentioned in this chapter is guilty of a felony.

COLORADO.

SECTION 494. If any certified report or statement made or public notice given by the officers of any corporation shall be false in any material representations, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all damages arising therefrom.

(No penal provision.)

CONNECTICUT.

(No penal provision.)

DELAWARE.

SECTION 31. If any certificate made or any public notice given by the officers of any company, in pursuance of the provisions of this act, shall be false in any material representation, all the officers who shall have signed the same, shall be jointly and severally liable for all the debts of the company contracted while they were stockholders or officers thereof.

(No penal provision.)

FLORIDA.

Revised Statute, Section 2467. Any officer, agent, clerk or servant of a corporation, who makes a false entry in the books thereof, with intent to defraud * * * shall be punished by imprisonment in the State prison not exceeding ten years, etc.

GEORGIA.

No penal provision.

IDAHO.

SECTION 7121. Every director, officer or agent of any corporation or joint-stock association, who knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, is guilty of a misdemeanor.

ILLINOIS.

SECTION 21. If any certified report or statement made or public notice given by the officers of any corporation shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all damages arising therefrom.

No penal provision.

INDIANA.

SECTION 5073. If any certificate or report made or public notice given by the officers of any such company, as required by this act, shall be false in any material representation, or if they shall fail to give such notice or make such report, and any person or persons shall be misled or deceived by such false report or certificate, or on account of such failure to make such report, and damaged thereby, then all the officers who shall sign the same knowing it to be false, or fail to give the notice or make the reports as aforesaid, shall be jointly and severally liable for all damages resulting from such failure on their part while they are stockholders in such company.

No penal provision.

IOWA.

CODE 1897.

§ 1623 *Keeping False Accounts.* The intentional keeping of false books or accounts shall be a misdemeanor on the part of any officer, agent, or employee of the corporation guilty thereof, or of any one whose duty it it is to see that such books or accounts are correctly kept.

§ 1620 *Fraud—Penalty for.* Intentional fraud in failing to comply substantially with the articles of incorporation or in deceiving the public or individuals in relation to their means or their liabilities, shall be a misdemeanor, and shall subject those guilty thereof to fine and imprisonment, or both, at the discretion of the Court. Any person who has sustained injury from such fraud may also recover damages therefor, against those guilty of participating in suchfraud.

KANSAS.

GENERAL STATUTES, 1901 (DASSLER).

§ 1411. *Liability of directors and officers,* § 169. Any officer, director, trustee, attorney, agent or servant of any association heretofore or hereafter to be incorporated, who shall use or dispose of any part

of the moneys, property, assets or funds of such association, or assign, transfer, cancel, deliver up or acknowledge satisfaction of any bond, mortgage or other written instrument belonging to such association, unless duly authorized, or otherwise than in the regular and legitimate business of the corporation, or who shall be guilty of any fraud in the performance of his duties, shall be liable civilly to the corporation and also, to any other party injured, to the extent of the damage thereby caused, and shall, also, be guilty of a felony, and upon conviction thereof, shall be imprisoned in the penitentiary for not less than one nor more than five years.

Kentucky Statutes, 1899 (Carroll).

§ 549. Officers and directors—liability for false report. If the directors or officers of any corporation shall knowingly cause to be published or given out any statement or report of the condition or business of the corporation that is false in any material respect, the officers and directors causing such report or statement to be published or given out, or assenting thereto, shall be jointly and severally individually liable for any loss or damage resulting therefrom.

§ 550. Directors and officers—penalty for violation of law. If the directors or officers of any corporation shall fail or refuse to comply with, or shall violate any of the provisions of this article, those so failing, refusing or violating shall be jointly and severally individually liable for and loss or damage resulting to any person from such failure, refusal or violation, and, in addition thereto, the persons so liable shall be each punished by a fine of not less than one hundred nor more than one thousand dollars.

Louisiana.

Revised Laws (Wolff, 1897).

§ 877. *False Statements or Perjury of Bankers.* Any banker, and any director, officer, agent or clerk of any banker or banking company, who shall make false statements or entries in the books of such banker or banking company, or who shall exhibit false papers or practice willful concealment of facts within his or their knowledge with intent to deceive the Board of Cur-

37444

rency or other person having lawful authority to examine, or to deceive the public as to the condition of such banker or banking company, as also any person who shall, with a view to defraud any such banker or banking company, knowingly draw or pay a check or checks without funds in the said company drawn upon, or to the embezzlement of any of the money or assets of said banker or banking company, by any clerk, officer or agent thereof, shall be subject on conviction to imprisonment in the penitentiary of this State for a term not less than one year nor more than three.

And when such false statements are made under oath the person or persons shall be adjudged guilty of perjury and punished according to law.

(No further provision.)

MARYLAND.

PUBLIC GENERAL LAWS (ART. XXVII.), 1888.

§ 97. Any officer or agent whatsoever of any corporation who shall fraudulently sign, or in any other manner assent to any statement or publication, either for the public or the shareholders thereof, containing untruthful representations of its affairs, assets or liabilities, with a view to enhance or depress the market value of the shares therein, or the value of its corporate obligations, or in any other manner to accomplish any fraud thereby, shall be deemed guilty of a misdemeanor, and upon conviction thereof, by indictment in any Court of Law, shall be fined not less than one thousand dollars nor more than ten thousand dollars, and be imprisoned in jail or penitentiary, or either fined or imprisoned, at the discretion of the Court, for not less than six months nor more than three years.

MASSACHUSETTS.

REVISED LAWS 1902, VOL. 2, p. 1757:

§ 58. An officer of a corporation, or an agent, clerk or servant of a person, firm or corporation who makes a false entry or omits to make a true entry in any book of such person, firm or corporation with intent to defraud, and any person whose duty it is to make a record or entry of the transfer of stock, or of the issuing or canceling of certificates thereof, or of the amount

of stock issued by a corporation, in any book thereof, who, with intent to defraud, omits to make a true record or entry thereof, shall be punished by imprisonment in the state prison for not more than 10 years or in the house of correction for not more than one year.

§ 56. (Officer, agent, &c., of corporation who issues stock certificate or bond, note, &c., beyond amount authorized by law, or negotiates same with intent to defraud, punishable by imprisonment.)

§ 57. (Officer, &c., of corporation who fraudulently issues stock certificate to person not entitled, punishable by imprisonment.)

§ 62. (Officer, &c., of corporation who uses name of corporation to obtain money on the credit of the corporation for his own use without authority from the corporation, or who fraudulently invests or disposes of money of corporation, punishable by imprisonment.)

§ 64. Whoever is convicted of any gross fraud or cheat at common law shall be punished by imprisonment, &c.

(No further provisions.)

MAINE.

(No penal provision.)

MINNESOTA.

SECTION 6449. A director, officer or agent of any corporation, or joint stock association, who knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, other than such as are elsewhere by this Code specially made punishable, is guilty of a misdemeanor.

MICHIGAN.

(No penal provision.)

MISSISSIPPI.

(No penal provision.)

MISSOURI.

(No penal provision.)

MONTANA.

SECTION 988. Every director, officer or agent of any corporation, or joint stock association, who knowingly concurs in making, publishing or posting any written report, exhibit or statement of its affairs or pecuniary condition, or book or notice containing any material statement which is false, or refuses to make any book or post any notice required by law, in the manner required by law, other than such as are mentioned in this chapter, is guilty of a felony.

NEBRASKA.

COMPILED STATUTES, 1901.

§ 630 [Sec. 15]*. *False Statements.* Any person or persons who shall wilfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any bank, corporation partnership, firm or individual transacting a banking business, or shall knowingly subscribe to or exhibit false papers, with the intent to deceive any person or persons authorized to examine into the affairs of said bank, corporation, partnership, firm or individual, or shall make, state or publish any false statement of the amount of the assets or liabilities of any such corporation, partnership, firm or individual, shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned in the State Penitentiary not less than one year nor more than ten years.

*NOTE. This is § 15 of Chapter 8 relating to "Banks," being also § 15 of the Act of 1895, entitled "An Act to establish a State Banking Board to define and designate State banks and to regulate said State banks. * * *"

(No further provision.)

NEW HAMPSHIRE.

L. 1895, Ch. 105, "An Act in relation to Savings Banks, State Banks and Trust Companies."

§ 5. That provision of law which requires a semi-annual examination of savings banks and semi-annual reports to the bank commissioner shall also be applicable to State banks and trust companies; and any

trustee or director of a savings bank, State bank or trust company, who shall make a statement which purports to be the condition of an institution examined by him without having fully and carefully examined into the condition of such institution, or who shall make a false statement of the condition of such institution with an intent to deceive, shall be fined one thousand dollars or be imprisoned not exceeding five years for each offence.

NEVADA.

(No penal provision.)

NEW JERSEY.

SECTION 157. That whosoever being a director, manager or public officer of any body corporate, or public company, shall make, circulate or publish, or concur in making, circulating or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of any such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to imprisonment at hard labor, not to exceed two years, or fine not exceeding four hundred dollars, or both.

NORTH CAROLINA.

SECTION 686. * * * In case of fraud by the president, directors, managers or stockholders in any corporation, the Court shall render personally liable to creditors and others injured thereby, such of the directors and stockholders as may have been concerned in the fraud.

(No penal provision.)

NORTH DAKOTA.

SECTION 7527. Every director, officer or agent of any joint-stock association who knowingly concurs in mak-

ing or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, other than are mentioned in Sections 7516 and 7517, or who wilfully refuses or neglects to make or deliver any written report, exhibit or statement required by law, is guilty of a misdemeanor.

OHIO.

SECTION 3245. * * * If the Board of Directors fail to make the annual statements required by this section, or if they make a false statement, they shall be personally liable for all claims and demands against such corporation.

(No penal provision.)

OREGON.

SECTION 1803. If any person, being, or assuming to be, an officer, agent or member of any private corporation or company, shall, with intent to defraud or deceive any one, wilfully and knowingly make, circulate or publish, or concur in making, circulating or publishing any written or printed statement or account concerning or relating to the liabilities, assets or property of such corporation or company, which statement or account shall be false in any material particular, such person, upon conviction thereof, shall be punished in manner provided in Section 1801.

(SECTION 1801. Imprisonment, three months to one year; fine, $50 to $1,000.)

PENNSYLVANIA.

PEPPER AND LEWIS DIGEST, 1896.

CRIMES (LX.) FALSE PRETENSES.

266. False statements by officers and servants of corporations. If any officer, director, superintendent, manager, receiver, employee, agent, attorney, broker or member of any bank or other body corporate or public company, municipal or quasi-municipal corporation, shall make, circulate or publish or concur in making, circulating or publishing, any written or

printed statement or account, which he shall know to be false in any particular with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, municipal or quasi-municipal corporation, or with intent to induce any person to become a shareholder or partner therein, or to interest or advance any money or property to such body corporate or public company, or to enter into any security for the benefit thereof, he shall be guilty of a misdemeanor. 1878, June 12, P. L. 196, § 4.

RHODE ISLAND.

SECTION 20. If any certificate made or any public notice given by the officers of any manufacturing company, in pursuance of the provisions of this chapter, shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the company contracted while they were stockholders or officers thereof.

No penal provision.

SOUTH CAROLINA.

SECTION 195. Any director or other officer or stockholder of any manufacturing company in this State, who shall knowingly or wilfully make, or cause to be made, any fraudulent misrepresentation or misrepresentations as to either the capital, property or resources of said corporation, shall be held guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine of not more than $2,000 or imprisonment for not longer than two years, or both, at the discretion of the Court.

SOUTH DAKOTA.

SECTION 6853. Every director, officer or agent of any corporation or joint-stock association, who knowingly concurs in making or publishes any written report, exhibit or statement of its affairs, or pecuniary condition, containing any material statement which is false, other than as are mentioned in sections 6842 and 6843, or wilfully refuses or neglects to make or deliver any written report, exhibit or statement required by law, is guilty of a misdemeanor.

37447

TENNESSEE.

SECTION 1716. Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their liabilities, subjects all officers, stockholders or directors knowingly participating therein, to the penalties of a misdemeanor; and, moreover, to damages at the suit of any person injured thereby.

SECTION 1717. The diversion of the funds of the corporation to other objects than those mentioned in the incorporation; the payment of dividends which leave insufficient funds to meet the liabilities of the corporation; the keeping of false books or accounts, whereby any one is injured; and the making and publishing of false reports, are such frauds as will subject those actively concerned therein to the penalties of the preceding section.

TEXAS.

(No penal provision.)

UTAH.

SECTION 4414. Every director, officer or agent of any corporation, or joint-stock association, and every private banker who knowingly makes or concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, other than such as are mentioned in this chapter, is guilty of a misdemeanor.

VERMONT.

(No penal provision.)

VIRGINIA.

(No penal provision.)

WASHINGTON.

(No penal provision.)

WEST VIRGINIA.

(No penal provision.)

WISCONSIN.

SECTION 4435. Any director, officer or manager of any body corporate or public company, * * * who shall make, circulate or publish, or concur in making, circulating or publishing any written or printed statement or account, which he shall know to be false in any particular, with intent to deceive or defraud any member, shareholder or creditor, of any such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any money or property to, or to enter into any security for the benefit of such body corporate or public company, * * * shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding five hundred dollars.

WYOMING.

(No penal provision.)

OKLAHOMA.

(No provision.)

NEW MEXICO.

(No provision.)

INDIAN TERRITORY.

(No provision.)

HAWAII.

Penal and Civil Codes, 1897.
(Nothing found.)